

ASSEMBLY BILL

No. 2142

Introduced by Assembly Member Keeley

February 23, 2000

An act to amend Section 12926 of the Government Code, relating to discrimination.

LEGISLATIVE COUNSEL'S DIGEST

AB 2142, as introduced, Keeley. Employment discrimination: gender identity.

Under the California Fair Employment and Housing Act, it is unlawful to engage in specified discriminatory employment practices, including hiring, promotion, and termination on the basis of sex. Existing provisions of the act also make it unlawful to engage in specified discriminatory practices in housing accommodations on the basis of sex. Under existing law, "sex," for purposes of the act, includes pregnancy, child birth, and related medical conditions.

This bill would provide that, for the purposes of the act, "sex" also includes "gender," as defined for purposes of certain provisions of the Penal Code, including provisions specifying gender-related criminal offenses and penalty enhancements, to mean the victim's actual sex or the defendant's perception of the victim's identity, appearance, or behavior, regardless of whether different from that traditionally associated with the victim's sex at birth.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 12926 of the Government Code
2 is amended to read:

3 12926. As used in this part in connection with
4 unlawful practices, unless a different meaning clearly
5 appears from the context:

6 (a) “Affirmative relief” or “prospective relief”
7 includes the authority to order reinstatement of an
8 employee, awards of backpay, reimbursement of
9 out-of-pocket expenses, hiring, transfers, reassignments,
10 grants of tenure, promotions, cease and desist orders,
11 posting of notices, training of personnel, testing,
12 expunging of records, reporting of records, and any other
13 similar relief that is intended to correct unlawful
14 practices under this part.

15 (b) “Age” refers to the chronological age of any
16 individual who has reached his or her 40th birthday.

17 (c) “Employee” does not include any individual
18 employed by his or her parents, spouse, or child, or any
19 individual employed under a special license in a nonprofit
20 sheltered workshop or rehabilitation facility.

21 (d) “Employer” includes any person regularly
22 employing five or more persons, or any person acting as
23 an agent of an employer, directly or indirectly, the state
24 or any political or civil subdivision of the state, and cities,
25 except as follows:

26 “Employer” does not include a religious association or
27 corporation not organized for private profit.

28 (e) “Employment agency” includes any person
29 undertaking for compensation to procure employees or
30 opportunities to work.

31 (f) “Essential functions” means the fundamental job
32 duties of the employment position the individual with a
33 disability holds or desires. “Essential functions” does not
34 include the marginal functions of the position.

35 (1) A job function may be considered essential for any
36 of several reasons, including, but not limited to, any one
37 or more of the following:



1 (A) The function may be essential because the reason
2 the position exists is to perform that function.

3 (B) The function may be essential because of the
4 limited number of employees available among whom the
5 performance of that job function can be distributed.

6 (C) The function may be highly specialized, so that the
7 incumbent in the position is hired for his or her expertise
8 or ability to perform the particular function.

9 (2) Evidence of whether a particular function is
10 essential includes, but is not limited to, the following:

11 (A) The employer's judgment as to which functions
12 are essential.

13 (B) Written job descriptions prepared before
14 advertising or interviewing applicants for the job.

15 (C) The amount of time spent on the job performing
16 the function.

17 (D) The consequences of not requiring the incumbent
18 to perform the function.

19 (E) The terms of a collective bargaining agreement.

20 (F) The work experiences of past incumbents in the
21 job.

22 (G) The current work experience of incumbents in
23 similar jobs.

24 (g) "Labor organization" includes any organization
25 that exists and is constituted for the purpose, in whole or
26 in part, of collective bargaining or of dealing with
27 employers concerning grievances, terms or conditions of
28 employment, or of other mutual aid or protection.

29 (h) "Medical condition" includes either of the
30 following:

31 (1) Any health impairment related to or associated
32 with a diagnosis of cancer, for which a person has been
33 rehabilitated or cured, based on competent medical
34 evidence.

35 (2) Genetic characteristics. For purposes of this
36 section, "genetic characteristics" means either of the
37 following:

38 (A) Any scientifically or medically identifiable gene or
39 chromosome, or combination or alteration thereof, that
40 is known to be a cause of a disease or disorder in a person

1 or his or her offspring, or that is determined to be
2 associated with a statistically increased risk of
3 development of a disease or disorder, and that is presently
4 not associated with any symptoms of any disease or
5 disorder.

6 (B) Inherited characteristics that may derive from the
7 individual or family member, that are known to be a
8 cause of a disease or disorder in a person or his or her
9 offspring, or that are determined to be associated with a
10 statistically increased risk of development of a disease or
11 disorder, and that are presently not associated with any
12 symptoms of any disease or disorder.

13 (i) “Mental disability” includes any mental or
14 psychological disorder, such as mental retardation,
15 organic brain syndrome, emotional or mental illness, and
16 specific learning disabilities. However, “mental
17 disability” does not include conditions excluded from the
18 federal definition of “disability” pursuant to Section 511
19 of the Americans with Disabilities Act of 1990 (42 U.S.C.
20 Sec. 12211). Additionally, for purposes of this part, the
21 unlawful use of controlled substances or other drugs shall
22 not be deemed, in and of itself, to constitute a mental
23 disability.

24 (j) “On the bases enumerated in this part” means or
25 refers to discrimination on the basis of one or more of the
26 following: race, religious creed, color, national origin,
27 ancestry, physical disability, mental disability, medical
28 condition, marital status, sex, age, or sexual orientation.

29 (k) “Physical disability” includes, but is not limited to,
30 all of the following:

31 (1) Having any physiological disease, disorder,
32 condition, cosmetic disfigurement, or anatomical loss that
33 does both of the following:

34 (A) Affects one or more of the following body systems:
35 neurological, immunological, musculoskeletal, special
36 sense organs, respiratory, including speech organs,
37 cardiovascular, reproductive, digestive, genitourinary,
38 hemic and lymphatic, skin, and endocrine.

39 (B) Limits an individual’s ability to participate in
40 major life activities.

(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

(3) Being regarded as having or having had a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2).

(4) Being regarded as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

It is the intent of the Legislature that the definition of “physical disability” in this subdivision shall have the same meaning as the term “physical handicap” formerly defined by this subdivision and construed in *American National Ins. Co. v. Fair Employment & Housing Com.* (1982) 32 Cal.3d 603. However, “physical disability” does not include conditions excluded from the federal definition of “disability” pursuant to Section 511 of the Americans with Disabilities Act of 1990 (42 U.S.C.; Sec. 12211). Additionally, for purposes of this part, the unlawful use of controlled substances or other drugs shall not be deemed, in and of itself, to constitute a physical disability.

(l) Notwithstanding subdivisions (i) and (k), if the definition of “disability” used in the Americans with Disabilities Act of 1990 (~~Public Law~~ (P.L. 101-336) would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (i) or (k), or would include any medical condition not included within those definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (i) and (k).

(m) “Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation” includes a perception that the person has any of those

1 characteristics or that the person is associated with a
2 person who has, or is perceived to have, any of those
3 characteristics.

4 (n) “Reasonable accommodation” may include either
5 of the following:

6 (1) Making existing facilities used by employees
7 readily accessible to, and usable by, individuals with
8 disabilities.

9 (2) Job restructuring, part-time or modified work
10 schedules, reassignment to a vacant position, acquisition
11 or modification of equipment or devices, adjustment or
12 modifications of examinations, training materials or
13 policies, the provision of qualified readers or interpreters,
14 and other similar accommodations for individuals with
15 disabilities.

16 (o) “Religious creed,” “religion,” “religious
17 observance,” “religious belief,” and “creed” include all
18 aspects of religious belief, observance, and practice.

19 (p) “Sex” includes, but is not limited to, pregnancy,
20 childbirth, ~~or~~ medical conditions related to pregnancy or
21 childbirth, *and a person’s gender, as defined in Section*
22 *422.76 of the Penal Code.*

23 (q) “Sexual orientation” means heterosexuality,
24 homosexuality, and bisexuality.

25 (r) “Supervisor” means any individual having the
26 authority, in the interest of the employer, to hire,
27 transfer, suspend, lay off, recall, promote, discharge,
28 assign, reward, or discipline other employees, or the
29 responsibility to direct them, or to adjust their grievances,
30 or effectively to recommend that action, if, in connection
31 with the foregoing, the exercise of that authority is not of
32 a merely routine or clerical nature, but requires the use
33 of independent judgment.

34 (s) “Undue hardship” means an action requiring
35 significant difficulty or expense, when considered in light
36 of the following factors: (1) the nature and cost of the
37 accommodation needed, (2) the overall financial
38 resources of the facilities involved in the provision of the
39 reasonable accommodations, the number of persons
40 employed at the facility, and the effect on expenses and



1 resources or the impact otherwise of these
2 accommodations upon the operation of the facility, (3)
3 the overall financial resources of the covered entity, the
4 overall size of the business of a covered entity with
5 respect to the number of employees, and the number,
6 type, and location of its facilities, (4) the type of
7 operations, including the composition, structure, and
8 functions of the work force of the entity, and (5) the
9 geographic separateness, administrative, or fiscal
10 relationship of the facility or facilities.

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